

SERVICE DATE – MAY 2, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC—LEASE AND OPERATION
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ After a small railroad filed a notice of exemption to lease and operate certain rail lines, a labor union representative asked the Board to reject the notice or revoke the exemption, which would have required the railroad to seek Board authorization under a more extensive process. The Board denied that request. In this decision, the Board denies the labor representative's subsequent request to reconsider that earlier decision.

Decided: May 1, 2012

Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, filed a verified notice of exemption on August 31, 2010, invoking the class exemption at 49 C.F.R. § 1150.41 to lease and operate certain rail lines in New York from Norfolk Southern Railway Company (NSR). The class exemption, which provides a more streamlined process than a full application under 49 U.S.C. § 10902, applies when, among other things, a Class III rail carrier seeks to acquire or operate an additional rail line. United Transportation Union-New York State Legislative Board (UTU-NY) filed a petition to reject the notice or revoke the exemption. In a decision served on September 23, 2011 (September 2011 decision), the Board denied both requests. On the basis of alleged material error, UTU-NY now petitions the Board to reconsider the denial of the request to reject the notice. M&NJ replied to that petition on October 26, 2011. For the reasons discussed below, the Board will deny the petition for reconsideration.

BACKGROUND

In 2009, M&NJ, which at the time was not a rail carrier, filed a notice of exemption to acquire and operate 6.5 miles of rail line (the Middletown-Slate Hill Line) from Middletown & New Jersey Railway Co., Inc. See Middletown & N.J. R.R.—Acquis. & Operation Exemption—

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Middletown & N.J. Ry., FD 35227 (STB served Mar. 20, 2009). Notice of the exemption was published on March 20, 2009 (74 Fed. Reg. 11,995), and the exemption took effect on April 5, 2009.

On August 31, 2010, M&NJ filed the notice of exemption at issue in this docket, involving M&NJ's lease of the following NSR lines: (1) the Hudson Secondary located between mileposts LX 2.1 and LX 20.6 (18.5 miles in length); (2) the Walden Secondary located between mileposts DJ 5.0-DJ 10.5 and WI 29.1-WI 32.9 (9.3 miles in length); (3) the Maybrook Industrial Track located between mileposts RT 1.3 and RT 7.5 (6.2 miles in length); (4) the Greycourt Industrial Track located between mileposts IL 52.5 and IL 53.4 (1.0 mile in length); and (5) the EL Connection Track located between mileposts QK 0.0 and QK 0.8 (0.8 mile in length) (collectively, the leased lines). In conjunction with leasing these lines, NSR also granted to M&NJ: (1) a sublease of connecting track owned by New York, Susquehanna & Western Railway (NYS&W) located between milepost JS 63.14, at Hudson Jct., N.Y., and milepost LX 2.1, at Hudson Jct. (approximately .35 miles in length); (2) incidental overhead trackage rights over NSR's rail line located between mileposts JS 67.50 and JS 63.14 (4.36 miles in length); and (3) a partial assignment of all of NSR's rights under the NYS&W Trackage Rights Agreement for NYS&W's continued trackage rights operations over the Hudson Secondary track between Hudson Jct. and Warwick, N.Y.

On September 27, 2010, UTU-NY filed a petition to reject the notice or revoke the exemption. On February 4, 2011, UTU-NY filed supplemental evidence and argument in which it claimed, as the basis for rejecting the notice, that the notice contained false or misleading information²—namely, that M&NJ was a rail carrier at the time the notice was filed.³ According to UTU-NY, although M&NJ had Board authorization to operate the Middletown-Slate Hill line, it had not yet commenced operations on that line at the time it filed the notice of exemption concerning the leased lines. UTU-NY maintained that M&NJ therefore was not a rail carrier and could not use the class exemption at 49 C.F.R. § 1150.41 for Class III carriers acquiring or operating an additional rail line.

² Pursuant to 49 C.F.R. § 1150.42(c), the exemption is void ab initio if the notice contains false or misleading information.

³ UTU-NY also argued that the petition should be revoked on a variety of grounds, including its competitive impact. UTU-NY has not raised the alternative revocation grounds in its petition for reconsideration. Although the petition for reconsideration requests that the Board reject the notice or revoke the exemption, UTU-NY, in fact, is challenging only the aspects of the September 2011 decision regarding possible rejection of the notice.

In response, M&NJ provided interchange reports on February 22, 2011, indicating that, beginning on April 7, 2009, it had commenced rail operations and interchanged rail cars (both loaded and empty) with NSR, some 14 months before it filed its notice of exemption in this docket.

The Board held in the September 2011 decision, among other things, that M&NJ became a rail carrier when it acquired the Middletown-Slate Hill line pursuant to the Board's authorization, and that M&NJ had held itself out as a common carrier and interchanged traffic with NSR thereafter in any event, as reflected in the interchange reports M&NJ filed.⁴ The Board concluded that the notice was neither false nor misleading and therefore denied the request to reject it.

PRELIMINARY ISSUE

On November 15, 2011, UTU-NY filed a motion to strike M&NJ's October 26, 2011 reply to the petition for reconsideration in its entirety or, alternatively, to strike the verified statement of Alfred Sauer and the accompanying exhibits. UTU-NY argues that M&NJ's reply contained additional evidence, which is not permitted in response to a petition for reconsideration. As an alternative to its motion to strike, UTU-NY asks that the Board consider its motion to strike as a petition for leave to file a reply to M&NJ's reply and that its filing be treated as its reply.⁵ M&NJ filed a reply on December 2, 2011, to UTU-NY's motion to strike.

Because the petition for reconsideration was based solely on alleged material error in evaluating the evidence that was before the Board when it issued the September 2011 decision, we will reach our decision based upon the evidence submitted prior to the September 2011 decision. Accordingly, we will grant UTU-NY's motion to strike the verified statement and accompanying exhibits in the reply.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009). UTU-NY argues that the September 2011

⁴ September 2011 decision, slip op. at 4.

⁵ Under the Board regulation at 49 C.F.R. § 1104.13, a reply to a reply is not permitted.

decision involves material error. As explained below, the Board did not materially err in denying UTU-NY's request to reject the notice of exemption.

UTU-NY argues that the Board erred in giving substantial weight to "unverified and inappropriate reply material advanced by M&NJ counsel" demonstrating that, as of April 2009, M&NJ had interchanged rail traffic with NSR.⁶ UTU-NY further argues that the Board "ignored" the statement of Samuel J. Nasca, New York Legislative Director for UTU-NY, that M&NJ "had not performed rail freight transportation since April 5, 2009, to and including August 31, 2010," and that M&NJ unfairly waited to submit the interchange reports until a reply to which UTU-NY was not permitted to respond.⁷

None of UTU-NY's claims is sufficient to demonstrate material error. M&NJ presented credible, documentary evidence of its operations to refute the claim of the UTU-NY personnel.⁸ As M&NJ explained, these reports were maintained by Railinc⁹—a disinterested third party—and showed that, beginning April 7, 2009 (well before the August 31, 2010 filing of M&NJ's notice of exemption), M&NJ had begun interchanging traffic with NSR (776 inbound and 531 outbound rail cars through October 4, 2010).¹⁰

In contrast, Mr. Nasca, who submitted a verified statement regarding rail operations by M&NJ, did not personally observe rail operations in the area of the Middletown-Slate Hill line. Rather, he relied upon unnamed UTU-NY operating personnel who informed Mr. Nasca that there had been no freight rail transportation performed by M&NJ on the Middletown-Slate Hill line prior to M&NJ filing the notice of exemption at issue.¹¹ These anonymous personnel did not swear to the truth of what they said to Mr. Nasca, and the Board correctly did not give dispositive weight to the second-hand assertions.

UTU-NY now argues that the interchange reports provided by M&NJ on February 22, 2011, were provided improperly in a reply, which prevented any response by UTU-NY.

⁶ Pet. for Reconsideration at 4.

⁷ Id.

⁸ M&NJ Reply to Supplemental Evidence and Argument, Feb. 22, 2011 (M&NJ Reply), at 6.

⁹ Id. Railinc provides information technology and information services to the railroad industry. See "Welcome to Railinc," <https://www.railinc.com> (last visited Apr. 24, 2012).

¹⁰ M&NJ Reply at 6 and Exhibit 5.

¹¹ UTU-NY Supplemental Evidence and Argument, Feb. 4, 2011, V.S. Nasca ¶ 2.

However, a verified notice of exemption for acquisition by a Class III rail carrier need not include documentary evidence that the filer is a Class III carrier, other than the required certification that it will remain one. See 49 C.F.R. § 1150.43. M&NJ only provided the interchange reports when it became necessary to rebut one of the arguments in UTU-NY's February 4, 2011 supplemental evidence and argument. M&NJ furnished the interchange reports on the first occasion after UTU-NY presented, through Mr. Nasca, the claims of anonymous personnel as to an absence of freight operations. M&NJ properly presented the reports to rebut the allegations in UTU-NY's petition, and the Board correctly credited them.

UTU-NY additionally argues that reconsideration is warranted because the Board erred as a matter of law in concluding that M&NJ became a rail carrier on the date it acquired the Middletown-Slate Hill line. UTU-NY asserts that, under 49 U.S.C. § 10902, an acquiring entity must actually begin service over an acquired line before it becomes a carrier. However, as the Board previously found, and as we reaffirm here, M&NJ's interchange reports show that it began common carrier service over the Middletown-Slate Hill line—and thus was a carrier even under UTU-NY's theory—before it filed its notice of exemption here. Although UTU-NY now surmises that all of the interchanged cars must have been empty cars destined to or from storage, the Railinc reports show that, as of August 31, 2010, M&NJ had interchanged numerous loaded rail cars with NSR.¹²

UTU-NY also claims that a 2011 Railroad Retirement Board decision indicates that M&NJ was not a rail carrier in 2009.¹³ To the contrary, that decision agrees with this Board's conclusion that M&NJ became a rail carrier in 2009, finding that M&NJ began operations and first compensated its employee on April 6, 2009.¹⁴

Finally, UTU-NY claims that, in denying UTU-NY's petition to reject or revoke, the Board erred in stating that UTU-NY had claimed that the Middletown-Slate Hill line had been abandoned prior to M&NJ's acquiring it.¹⁵ Although the Board did misidentify the portion of the Middletown & New Jersey Railway Co., Inc. line that UTU-NY claimed was abandoned,¹⁶ that

¹² Compare M&NJ Reply, Ex. 5, column titled "Loads," with column titled "Empties."

¹³ Pet. for Reconsideration at 5.

¹⁴ Pet. for Reconsideration, attachment B.C.D. 11-46 at 2.

¹⁵ Pet. for Reconsideration at 3.

¹⁶ In a verified statement attached to UTU-NY's Feb. 4, 2011 Supplemental Evidence and Argument, Mr. Nasca stated his understanding that the Middletown & New Jersey Railway Co., Inc. line "*between Slate Hill and Unionville* had been abandoned no later than December 5,

(continued . . .)

error was immaterial, as the Board's denial of UTU-NY's petition did not rest on that incorrect reading.

For these reasons, we find no material error in our September 2011 decision and therefore deny UTU-NY's request for reconsideration.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-NY's motion to strike the verified statement and accompanying exhibits in M&NJ's reply to the petition for reconsideration is granted.
2. The petition for reconsideration is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

(. . . continued)

2008. . . ” (emphasis added), which the Board incorrectly read as a claim that the line *between Middletown and Slate Hill* had been abandoned.